

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DANIEL GEORGE GRAVELLE,

Plaintiff,

v.

BRIAN GREEN, *et al.*,

Defendants.

3:19-cv-00141-MMD-CBC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹**

Before the Court is Plaintiff Daniel George Gravelle's ("Gravelle"), application to proceed *in forma pauperis* (ECF No. 1), and his *pro se* civil rights complaint (ECF No. 1-1). For the reasons stated below, the Court recommends that Gravelle's *in forma pauperis* application (ECF No. 1) be granted and that his complaint (ECF No. 1-1) be dismissed without prejudice, and without leave to amend.

I. *IN FORMA PAUPERIS* APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

2 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some
3 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir.
4 1981) (quotation marks and citation omitted). A litigant need not "be absolutely destitute to
5 enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331,
6 339 (1948).

7 A review of the application to proceed IFP reveals Gravelle cannot pay the filing fee;
8 therefore, the Court recommends that the application be granted.

9 **II. SCREENING STANDARD**

10 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
11 provides, in relevant part, that "the court shall dismiss the case at any time if the court
12 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim
13 upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is
14 immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when "it lacks an
15 arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This
16 includes claims based on legal conclusions that are untenable (e.g., claims against
17 defendants who are immune from suit or claims of infringement of a legal interest which
18 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
19 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th
20 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
21 standard applied in the context of a motion to dismiss under Federal Rule of Civil Procedure
22 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which requires dismissal
23 where the complaint fails to "state a claim for relief that is plausible on its face," *Bell Atl.*
24 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

25 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*
26 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must
27 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that

the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The complaint need not contain detailed factual allegations, but must offer more than “a formulaic recitation of the elements of a cause of action” and “raise a right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a liberal construction may not be used to supply an essential element of the claim not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

III. SCREENING OF COMPLAINT

In his complaint, Gravelle sues Defendants Public Defender Brian Green and Elko County under 42 U.S.C. § 1983 and asserts an ineffective assistance of counsel claim based on Defendant Green’s failure to file a direct appeal in Gravelle’s case. (See ECF No. 1-1). Gravelle seeks monetary damages and dismissal of his criminal charges. (*Id.* at 18). For the reasons discussed below, the Court finds that the complaint fails to state a proper jurisdictional basis and fails to state a claim upon which relief can be granted.

A. Collateral Attack of Criminal Conviction

42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). The statute “provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights[.]” *Conn v. Gabbert*, 526 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing substantive provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the violation of a federally-protected

1 right by (2) a person or official who acts under the color of state law. *Anderson v. Warner*,
2 451 F.3d 1063, 1067 (9th Cir. 2006).

3 However, § 1983 is not a backdoor through which a federal court may overturn a
4 state court conviction or award relief related to the fact or duration of a sentence. Section
5 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts
6 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they different
7 in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir. 2003) (quoting
8 *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take care to prevent
9 prisoners from relying on § 1983 to subvert the differing procedural requirements of *habeas*
10 *corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at 486-87; *Simpson v.*
11 *Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner challenges the legality or
12 duration of his custody, raises a constitutional challenge which could entitle him to an earlier
13 release, or seeks damages for purported deficiencies in his state court criminal case, which
14 effected a conviction or lengthier sentence, his sole federal remedy is a writ of *habeas*
15 *corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997); *Heck*, 512 U.S. at 481; *Wolf v.*
16 *McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Simpson*,
17 528 F.3d at 692-93. Stated differently, where “a judgment in favor of the plaintiff would
18 necessarily imply the invalidity of his conviction or sentence,” then “the complaint must be
19 dismissed unless the plaintiff can demonstrate that the conviction or sentence has already
20 been invalidated.” *Heck*, 512 U.S. at 487.

21 It is apparent that Gravelle is challenging the constitutionality of his state court
22 criminal proceeding. Consequently, he must demonstrate that his conviction has been
23 overturned to proceed in an action under § 1983. As he has not done so, his sole relief is a
24 *habeas corpus* action. The Court, therefore, recommends that the complaint be dismissed
25 without prejudice and without leave to amend.

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1 **B. A Criminal Defense Attorney is Not a State Actor Under § 1983**

2 The Supreme Court has concluded that when criminal defense attorneys are acting
 3 in their role as advocate, they are not acting under color of state law for purposes of § 1983.
 4 See, e.g., *Vermont v. Brillon*, 556 U.S. 81, 91 (2009); *Polk Cnty. v. Dodson*, 454 U.S. 312,
 5 320-25 (1981); *Jackson v. Brown*, 513 F.3d 1057, 1079 (9th Cir. 2008); *United States v. De*
 6 *Gross*, 960 F.2d 1433, 1442 n.12 (9th Cir. 1992) (en banc). In *Polk County*, the Supreme
 7 Court held that defense counsel “does not act under color of state law when performing a
 8 lawyer’s traditional functions as counsel to a defendant in criminal proceedings.” 454 U.S.
 9 at 325. The Court reasoned that a public defender does not act under color of state law
 10 when representing a defendant in a state criminal proceeding for purposes of § 1983
 11 because he or she is “not acting on behalf of the State; he is the State’s
 12 adversary.” *Id.* at 323 n.13; see also *West v. Atkins*, 487 U.S. 42, 50 (1988). Furthermore,
 13 their conduct as legal advocates is controlled by professional standards independent of the
 14 administrative direction of a supervisor. See *Brillon*, 556 U.S. at 91; *Polk Cnty.*, 454 U.S. at
 15 321.

16 The case law clearly demonstrates that Gravelle may not bring a § 1983 action
 17 against Defendant Green based on his legal counsel in the criminal case. The Court
 18 therefore finds that such allegations fail to state a claim upon which relief may be granted
 19 and accordingly, recommends that this case be dismissed.

20 **IV. CONCLUSION**

21 For the reasons articulated above, the Court recommends that Gravelle’s application
 22 to proceed *in forma pauperis* (ECF No. 1) be granted, and that Gravelle’s complaint (ECF
 23 No. 1-1) be dismissed without prejudice and without leave to amend.

24 The parties are advised:

25 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
 26 Practice, the parties may file specific written objections to this Report and Recommendation
 27 within fourteen days of receipt. These objections should be entitled “Objections to

1 Magistrate Judge's Report and Recommendation" and should be accompanied by points
2 and authorities for consideration by the District Court.

3 2. This Report and Recommendation is not an appealable order and any notice
4 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
5 Court's judgment.

6 **V. RECOMMENDATION**

7 **IT IS THEREFORE RECOMMENDED** that Gravelle's application to proceed *in forma*
8 *pauperis* (ECF No. 1) be **GRANTED**;

9 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** Gravelle's complaint (ECF
10 No. 1-1); and

11 **IT IS FURTHER RECOMMENDED** that Gravelle's complaint (ECF No. 1-1) be
12 **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND.**

13 **DATED:** August 14, 2019.

14
15 
16 **UNITED STATES MAGISTRATE JUDGE**